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FILE: WAC 06 215 53094 Office: CALIFORNIA SERVICE CENTER Date: DEC 20 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates a tax, insurance, and automobile business. It claims to employ two personnel and to have had a gross annual income of \$100,000 when the petition was filed. It seeks to employ the beneficiary as a marketing analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record of proceeding before the AAO contains: (1) the Form I-129 filed June 30, 2006 and supporting documentation; (2) the director's October 5, 2006, request for evidence (RFE); (3) counsel's December 26, 2006 response to the director's RFE and supporting documentation; (4) the director's January 22, 2007 denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On January 22, 2007, the director denied the petition determining that the petitioner had not established it had a marketing position available to offer the beneficiary. On appeal, counsel for the petitioner asserts the director's decision is in error and is an abuse of discretion. The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner states that it is seeking the beneficiary's services as a marketing analyst. In a June 26, 2006 letter in support of the petition, the petitioner listed the responsibilities of the proffered position as follows:

[The beneficiary] will be responsible to research customer orientation, study the market and market segmentation, set objectives, and to implement the marketing plan to increase company insurance marketing systems. He will seek out new clients and develop clientele by networking to find new customers and generate lists of prospective clients. Also, he will explain features, advantages and disadvantages of various insurance policies to promote sale of insurance plans. He is responsible for the day-to-day marketing of commercial insurance accounts. He will prepare high quality and accurate proposals for presentation. To facilitate the successful placement of client insurance programs, he will also be responsible for developing and maintaining close working relationships with insurance company account managers within the office. Further, he will be required to increase the sales and customer patronage through advertisement, sales, promotion, and public relations. In performing his duties he will be dividing [sic] approximately 35% of his time in research and data gathering, approximately 35% in analyzing the data & developing solutions to marketing problems, approximately 20% in developing marketing strategies, and approximately 10% in writing reports and advising management.

In response to the director's request for evidence establishing that the proffered position was a specialty occupation, the petitioner stated that it needed a market analyst who had experience and who would research the market and gather data to provide correct and up-to-date information and advice to clients and management. The petitioner also indicated:

As a Marketing Analyst, the Beneficiary, will make year-end tax accrual calculation[s] and assist with tax compliance designs. He will research, analyze, and interpret current and proposed tax legislation. He will analyzed [sic] his research to make assessment impact reports concerning the new regulations. These reports will assist, inform, and educate our staff and clients in making informed financial decisions. In addition, he will be responsible

for analyzing business and operating procedures and devising the most efficient methods of marketing insurance policies. He will accomplish this by studying marketing problems, procedures, information flow, or cost analysis of the insurance industries. He will research local market and any potential market to determine potential sales of insurance policies. He will gather these data by conducting surveys, opinion polls or questionnaires, and examine and analyze such gathered statistical data to forecast future marketing trends. He will assess and analyze competitors' prices, sales, and methods of marketing and distribution for its effectiveness or ineffectiveness. Also he will need to collect data on customer preferences in order to improve current marketing and sales. Most importantly, he will analyze the data gathered and develop cost effective solutions and or successful alternate marketing methods to market our services.

The petitioner also provided copies of four Internet job advertisements for employment as: (1) a marketing analyst for a real estate firm and property management company that required a business degree in business administration or a similar degree; (2) a marketing analyst for an advertising/public relations firm that required a bachelor's degree in business or marketing; (3) a marketing analyst for a land developer who required the qualified candidate to have a bachelor's degree in business; and (4) a marketing analyst for a non-bank subsidiary of Wells Fargo that required a bachelor's degree.

On January 22, 2007, the director denied the petition. The director observed that the petitioner's business did not extend beyond the local community and thus the petitioner's business lacked an extensive or complex consumer base to require the services of a marketing staff. The director also noted that the petitioner did not have a marketing division or any marketing specialists and thus did not appear to have the organizational complexity to require the services of a market research analyst. The director also referenced the Department of Labor's *Occupational Outlook Handbook's (Handbook)* discussion of market research analysts and surmised that the *Handbook* implied that market research analyst positions would be found within large firms or corporations; thus as the petitioner did not engage in the type of business that would typically require the services of a market research analyst, the petitioner's proffered position was not that of a market research analyst. Upon analyzing the duties of the proffered position, the director noted that the duties of the proffered position appeared to reflect some of the duties performed by market research analysts as listed under the Market and Survey Researchers section in the *Handbook*; the director determined however, that sole reliance on a list of duties resembling those of an occupation found in the *Handbook* was misplaced. The director concluded that the petitioner had not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) classifying the position as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director improperly took notice of the size of the petitioner when determining that the petitioner was not sufficiently complex organizationally to require the services of a market analyst. Counsel cites *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989) in support of his assertion. Counsel contends that the petitioner's purpose of hiring a market research analyst is to expand its business beyond the local community and to stay competitive. Counsel asserts that the petitioner has adequately specified the beneficiary's job duties and has established it has the organizational complexity and business structure necessary to legitimately offer the position of marketing research analyst.

While, as discussed below, the AAO does not find that the petitioner has established that the proffered position is that of a marketing analyst or a market research analyst, it has reached its conclusions on grounds other than those relied upon by the director. The director's statements regarding the extent of the petitioner's business and his interpretation of the *Handbook* as regards the types of firms or organizations that typically employ market research analysts are withdrawn. However, the director has properly determined that the position as described is insufficient to qualify as a specialty occupation.

The AAO turns first to an analysis of the duties of the proffered position and the occupation(s) that includes the described duties. To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The occupation described in this matter, while including some marketing tasks, is insufficiently described and documented to establish that it is a marketing analyst or a market research analyst position. The petitioner's initial description of the duties of the proffered position indicated the beneficiary would: "explain features, advantages and disadvantages of various insurance policies to promote sale of insurance plans," "[be] responsible for the day-to-day marketing of commercial insurance accounts," "seek out new clients and develop clientele by networking to find new customers and generate lists of prospective clients," "prepare high quality and accurate proposals for presentation," and "be responsible to research customer orientation, study the market and market segmentation, set objectives, and to implement the marketing plan to increase company insurance marketing systems."¹ These tasks are essentially the tasks of an insurance salesperson. Every salesperson must necessarily know their market, investigate leads, network to generate additional leads, and "market" their product. Selling a product, although including tasks linked to those of a marketing manager, a promotion specialist, or an advertising specialist, are not the tasks of a marketing analyst or a market research analyst. The petitioner's initial description failed to describe an individual who would be performing marketing duties at a level that includes the theoretical and practical application of a body of specialized knowledge attained through a four-year course of study at the university level.

¹ The AAO notes that the petitioner also indicated: "[i]n performing his duties [the beneficiary] will be dividing [sic] approximately 35% of his time in research and data gathering, approximately 35% in analyzing the data & developing solutions to marketing problems, approximately 20% in developing marketing strategies, and approximately 10% in writing reports and advising management. However, the petitioner does not provide the underlying detail to explain these general statements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner's second iteration of the duties of the proffered position also failed to establish that the proffered position included tasks of a specialty occupation. The petitioner indicated generally that the beneficiary would be involved in assisting the office in tax preparation; this, however, is not a marketing task. The petitioner again indicates that the beneficiary would devise ways to market insurance policies; a task that suggests the beneficiary would continue his efforts to sell insurance policies. Although the petitioner next indicates that the beneficiary will be involved in "studying marketing problems, procedures, information flow or cost analysis" and will research local and potential markets by conducting surveys, opinion polls, or questionnaires, these are general statements that paraphrase portions of the *Handbook* and are not statements supported with detail or documentation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Likewise, the petitioner's references to collecting and examining statistical data regarding competitors' prices, sales, and methods of marketing, and customers' preferences is a paraphrase of the *Handbook's* discussion of market research analysts.

The *Handbook* states the following with regard to the employment of marketing research analysts:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze statistical data on past sales to predict future sales. Market research analysts devise methods and procedures for obtaining the data they need. Often, they design telephone, mail, or Internet surveys to assess consumer preferences. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction.

After compiling and evaluating the data, market research analysts make recommendations to their client or employer on the basis of their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Market research analysts also might develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

* * *

Because of the applicability of market research to many industries, market research analysts are employed throughout the economy....

A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a market research analyst gathers statistical data on competitors and examines prices, sales, and methods of marketing and distribution. Neither can the petitioner establish its employment as a specialty occupation by making conclusory statements regarding the position, rather than defining the activities associated with the

position, for example, describing how the beneficiary assesses the market conditions for the petitioner including evidence of the methodology used. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. A generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, the petitioner must describe the specific duties and responsibilities to be performed by the beneficiary in relation to its particular business interests.

As referenced above, the more detailed portion of the description suggests that the beneficiary will be conducting the necessary research to sell insurance policies and also will be assisting in tax preparation. These are not the duties of a marketing analyst or a market research analyst. The petitioner has not offered evidence establishing that sales positions or tax assistant positions are positions that are specialty occupations. The *Handbook* does not report that a sales manager requires a degree. The beneficiary's involvement in tax preparation is not sufficiently detailed to determine whether the duties involved are clerical or require some knowledge of basic accounting skills, or more advanced skills. The AAO finds that the petitioner has not established that the duties of the proffered position incorporate the duties of a specialty occupation under the requirements of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish its proffered position as a specialty occupation under the second criterion, a petitioner must prove that a specific degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that only an individual with a degree in the specific specialty can perform the duties of the position. In reaching its decision, the AAO has reviewed the four job announcements submitted to establish that the petitioner's degree requirement is the industry norm. Of the four job announcements submitted by the petitioner in response to the director's RFE, none appear to come from businesses that are similar to the petitioner, a two-person tax, insurance, and automobile business. In addition, the job announcements submitted do not show that the advertising businesses are similar to the petitioner in size, number of employees, or level of business, nor can the job descriptions provided by these listings be established as parallel to the job description provided for the proffered position. Accordingly, they fail to satisfy the second criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations. The petitioner has not provided probative evidence that a degree requirement for the proffered position is the industry norm as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree in a specific discipline can perform the work associated with the position. In this matter, the petitioner has not provided a sufficiently detailed description that demonstrates that the proffered position is more than a sales position or assistant tax preparer. The record does not describe duties that evidence that the beneficiary must have a degree in a specific discipline to perform the duties of the position. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical insurance salesperson or tax clerk, positions that do not normally require a degree or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific discipline. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), whether the employer normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, CIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In this matter the petitioner does not claim nor does counsel assert that the petitioner has previously hired only degreed individuals to perform the duties of the proffered position. Likewise, the record offers no evidence of the petitioner's past hiring practices to establish that the petitioner normally requires a degree or its equivalent for the proffered position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Upon review of the duties of the proffered position, the petitioner has not established that the duties, as described by the petitioner, reflect a requirement of a higher degree of specialized or complex knowledge and skill. The petitioner has provided generic statements from the *Handbook* to describe the proffered position and to establish that the position is that of a marketing analyst or a market research analyst. The record, however, does not provide underlying support that the beneficiary's actual daily duties encompass any of the activities associated with analyzing statistics, designing methodologies, or otherwise developing marketing plans. The petitioner does not explain or expound upon the beneficiary's tax preparation activities or insurance sales activities. Nor does the petitioner represent and substantiate that the proffered position requires the performance of an amalgam of jobs that would require the beneficiary to possess specialized skills and complex qualifications usually associated with the attainment of a baccalaureate or higher degree. The job duties of the position do not reflect the specialization or complexity that require the individual performing the tasks to have attained a bachelor's degree or its equivalent. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO acknowledges counsel's citation to *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989); however, in this matter, the petitioner has not described a position that includes the theoretical and practical application of a body of highly specialized knowledge attained through a course of study at the bachelor's or higher level. In addition, the petitioner has not provided an adequate and comprehensive description that relates the beneficiary's specific duties to its two-person tax and insurance business. Moreover, the AAO notes it is reasonable to assume that the size of an employer's business has an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Counsel's citation to *Young China Daily v. Chappell* is not probative in this matter.

Upon review of the totality of the evidence submitted in support of the petition, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.